SHAHRIL YAHYA A

v.

PP

HIGH COURT MALAYA, IPOH B
CHONG SIEW KHIM JC
[CRIMINAL APPEAL NO: 42-1-2009]
30 JUNE 2010

CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 19(2) - Making of statement which is false or intended to mislead - Accused making statement inconsistent with previous three statements made by him to ACA officers - Earlier statement stating that gratification sought was a 'commission' - Later statement stating that gratification sought was a 'loan' - Whether inconsistency proven - Whether prosecution case proven beyond reasonable doubt* C D

CRIMINAL PROCEDURE: *Charge - Defective charge - Whether duplicity and ambiguity in charge - Charge of making statement inconsistent with previous three statements made to ACA officers - Whether three distinct offences arose from three statements resulting in duplicity and ambiguity in charge - Whether all three statements were correlative and corresponded with same matter* E

CRIMINAL PROCEDURE: *Defence - Establishment of - Whether a mere afterthought - Charge of making statement inconsistent with previous three statements made to ACA officers - Accused imputing inducement or coercion by ACA officers only at defence stage - Line of defence not put to prosecution witnesses in cross-examination for them to agree or refute - Whether defence established* F G

CRIMINAL PROCEDURE: *Sentencing - False statement - Allegation of - Making of statement which is false or intended to mislead an ACA officer under Anti-Corruption Act 1997, s. 19(2) - Accused sentenced to six months' imprisonment and fine RM20,000 in default six months' imprisonment - Whether sentence manifestly excessive - Deterrent effect to discourage witnesses from reneging on earlier statements made during course of investigations* H

The accused, a contractor, was awarded a project by Jabatan Kerja Raya (JKR). He was the main witness in Criminal Case No. 61-4-2003 *viz*. *PP v. Remely Din Hussin* tried at Ipoh Sessions Court. Remely, a technician from JKR who supervised the said project was charged under s. 165 of the Penal Code on the allegation of having I

A asked the accused to pay him commission in relation to this project. The accused gave three statements to BPR officers which incriminated Remely in relation to his demand for commission. The three statements were P1 (recorded by SP1), P3 (recorded by SP3) and P5 (recorded by SP4) with the pertinent portions marked as
B P1A, P3A and P5C and specifically quoted in the amended charge against the accused. At the trial against Remely, the accused testified but gave evidence inconsistent with P1A, P3A and P5C. Contrary to what he stated in his recorded statements as commission, the accused however testified that Remely asked for a
C loan of RM10,000 from him. SP3 recorded two statements from the accused (P3 and P4). A police report was lodged against the accused under s. 19(2) of the Anti-Corruption Act 1997 ('ACA97') that led to the charge against the accused. The accused was found guilty, convicted and sentenced to six months' imprisonment and fined
D RM20,000 in default six months' imprisonment. Hence this appeal by the accused. The following issues were ventilated by counsel for the accused: (i) that there were three distinct offences arising from the three statements P1, P3 and P5 resulting in duplicity and ambiguity in the charge; (ii) that there was no inconsistency as the
E two words "commission" and "loan" are bonded by a common denominator in the definition of "gratification" in s. 2 of the ACA97. Thus it was contended that there was no inconsistency; (iii) that the Sessions Court judge erred in her failure to comply with s. 173(m)(i) of the Criminal Procedure Code.

F

Held (dismissing the appeal and affirming the conviction and sentence):

(1) P1 being the first statement kick-started the criminal process
G against Remely based on the accused's disclosure that a commission was asked of him by Remely and it was duly given. P3 and P4 were recorded as a follow-up on P1 to get additional information and to confirm that RM10,000 was indeed credited into the account of Remely. Meanwhile P5 was recorded to get
H the accused's explanation pertaining to letter P7 which was received from Remely wherein was stated that the said RM10,000 was given by the accused to Remely as a loan. It was hence clear that there was no "duplicity" or three permutation of inconsistent statements because the three
I statements referred to in the charge were correlative and corresponded with the same matter namely "komisyen". The three statements not only complemented each other but further

reinforced the fact in issue that it was a commission and nothing else that was asked for and given to Remely. The three statements were used to describe the inconsistency that formed the crux of the offence under s. 19(2) of the ACA97. (paras 11-13)

(2) An overall reading and understanding of the three statements (P1, P3 and P5) underscored the irreconcilable incompatibility between "komisyen" and "pinjaman" which irrefutably bear different meanings and connotations that had morphed the case against Remely. (para 21)

(3) The evidence adduced by the prosecution was sufficient to find a *prima facie* case against the accused. The defence had failed to cast any reasonable doubt on the prosecution case resulting in the incontrovertible conclusion that the prosecution had proved its case beyond reasonable doubt. (para 23)

(4) The accused imputed inducement or coercion by the BPR officers only at the defence stage. This line of defence was not put to SP1 and SP3 in cross-examination for them to agree or refute. This was tantamount to an afterthought and denial by the accused. It was in any event in his evidence that the said three statements were read over to him by the recording officers and he signed at the end of each to signify that they were true. (para 28)

(5) The sentence meted out by the trial judge was not manifestly excessive. It was appropriate by its deterrent effect to deter and discourage effectively witnesses from reneging on what they have earlier stated in the course of investigations by the relevant agency. (para 32)

Case(s) referred to:
Mahendran Manikam v. PP [1997] 1 CLJ Supp 473 HC ***(refd)***
PP v. Heah Lian Khin [2000] 3 SLR 609 ***(refd)***
Yusof Omar lwn. PP [2001] 3 CLJ 122 CA ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 2, 19(2)
Criminal Procedure Code, s. 173(m)(i)
Penal Code, s. 165

For the appellant - Mohamad Asri Othman; M/s Asri, Chek Meng & Co
For the respondent - Saiful Hazmi Mohd Saad DPP; MACC

Reported by Amutha Suppayah

A

JUDGMENT

Chong Siew Khim JC:

[1] The appellant (referred hereinafter as the accused) was charged at the Sessions Court as per this amended charge:

B

> Bahawa kamu pada 9 Julai 2003, di Mahkamah Seksyen 2, Ipoh, dalam Daerah Kinta, dalam Negeri Perak, semasa perbicaraan kes jenayah 61-4-2003, *Pendakwa Raya lawan Remely bin Hussin* telah memberi keterangan seperti berikut:
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> C
>
> > Dia ada minta pinjaman dengan saya sebanyak RM10,000 saya tidak ada apa-apa masalah.
> >
> > Dia minta pinjaman daripada saya untuk apa saya tidak pasti, saya pun beri kepada beliau.
>
> D
>
> Yang mana kamu mempunyai obligasi di sisi undang-undang untuk menyatakan yang benar dan didapati penyataan-penyataan tersebut tidak selaras dengan penyataan-penyataan yang telah kamu buat sebelumnya kepada pegawai-pegawai Badan Pencegah Rasuah, Perak semasa pegawai-pegawai itu menjalankan kuasa yang
> E
> diberikan oleh Akta Pencegahan Rasuah 1997 (Akta 575) seperti berikut:
>
> (i) Penolong Penguasa Maznah bte Che Muda di Pejabat Badan Pencegah Rasuah Perak, Ipoh pada 15 Mei 2002.
>
> F
>
> Bagi Projek Rangsangan Baru ini, Remely telah meminta daripada saya supaya adjust agar beliau dapat 10% daripada harga kontrak. Beliau sendiri yang sebut katanya RM10 ribu. Daripada pemahaman saya RM10 ribu yang diminta adalah untuk komisyen.
>
> G
>
> (ii) Penyiasat Khairolaffendi bin Isnin di Pejabat Badan Pencegah Rasuah Perak, Ipoh pada 1 Ogos 2002:
>
> Untuk Projek Rangsangan Baru ini, sekali lagi saya ingin menegaskan dan mengesahkan bahawa memang Remely ada meminta saya adjust 10% daripada harga kontrak dan memang
> H
> beliau ada minta wang berjumlah RM10,000 iaitu bayaran komisyen kepada beliau selepas adjust 10%.
>
> (iii) Penolong Penguasa Hamidah bt Aziz di Pejabat Badan Pencegah Rasuah Perak, Ipoh pada 23 September 2002:
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> I
>
> Saya dengan sesungguh hati tanpa paksaan dari mana-mana pihak masih ingin mengekalkan bahawa wang RM10,000 yang telah saya berikan pada 4 Februari 2002 adalah merupakan

wang komisyen yang telah diminta oleh Remely dan bukannya wang pinjaman seperti yang terkandung di dalam surat yang dirujuk tadi.

Oleh itu kamu telah melakukan kesalahan di bawah s. 19(2) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah seksyen yang sama.

[2] He was found guilty, convicted and sentenced to six months imprisonment and fined RM20,000 in default six months' imprisonment. After hearing submissions on his appeal against this decision I dismissed the appeal against which he is now appealing to the Court of Appeal.

Factual Background

[3] The accused was a class F contractor. He was awarded a project by Jabatan Kerja Raya (JKR) known as "Projek Rangsangan Baru" to carry out works for certain schools in Perak. He was the main witness in Criminal Case No. 61-4-2003 *viz. Pendakwa Raya v. Remely Din Hussin* tried at Ipoh Sessions Court No. 2. Remely bin Hussin ("Remely") was charged under s. 165 of the Penal Code. Remely was a technician from JKR who supervised the said project.

[4] He was alleged to have asked the accused to pay him commission in relation to this project.

[5] The accused gave three statements to BPR officers (witnesses SP1, SP3 and SP4) which incriminated Remely in relation with his demand for commission. The three statements are P1 (recorded by SP1, Maznah bt Che Muda, on 15 May 2002), P3 (taken down by SP3, Khairolaffendi bin Isnin, on 1 August 2002) and P5 (recorded by SP4, Hamidah bt Aziz, on 23 September 2002) with the pertinent portions marked as P1A, P3A and P5C which are specifically quoted in the amended charge against the accused.

[6] At the trial against Remely, the accused was called as the first witness on 9 July 2003. SP2 (Roshan a/l Karthikayan) was the deputy public prosecutor who prosecuted that case before Sessions Court judge, Puan Maznah bt Abdul Aziz (SP5). The testimony of the accused until where it stopped when he was said to have given evidence inconsistent with P1A, P3A and P5C is P2, the typed version of the notes taken down by SP5. Contrary to what he stated in his recorded statements as commission, the accused however

testified during examination-in-chief before SP5 that Remely asked for a loan of RM10,000 ("pinjaman") from him. P2A is the relevant part:

> Dia ada minta pinjaman dengan saya sebanyak RM10,000 saya tidak ada apa-apa masalah. Dia ada minta pinjaman daripada saya untuk apa saya tidak pasti, saya pun beri kepada beliau.

[7] This answer was in response to SP2's question to the accused regarding the sum of RM10,000 that was paid to Remely. According to SP2, he found this reply to be a contradiction that was material to the case and which did not appear in his statements P1, P3, P4 and P5. In that event, he asked for an adjournment of the case in order to refer the matter to his superiors. SP3, who was also the investigating officer in *Pendakwa Raya v. Remely Hussin*, recorded two statements from the accused (P3 and P4). He testified that before the case against Remely begun, the accused's memory was refreshed with reference to the statements that he gave. He was subsequently told by SP2 that the accused's testimony in court was inconsistent with what he stated in his statements. On the instruction of SP2, SP3 lodged report no. 82/2003 for the purpose of investigation under s. 19(2) of the Anti-Corruption Act 1997 that led to the charge against the accused.

[8] The following were the issues ventilated by learned counsel for the accused.

Duplicity In Charge

[9] It was submitted by counsel En Mohamad Asri bin Othman that there were three distinct offences arising from the three statements P1, P3 and P5 resulting in duplicity and ambiguity.

[10] He apparently took issue that the trial judge did not adequately address this issue in that she dismissed the issue without giving any reason. I gathered from her grounds of decision that she put it this way:

> Mengenai isu duplicity, mahkamah berpendapat tidak wujud tiga distinct offences disebabkan tiga pernyataan yang tidak selari.
>
> Pertuduhan terhadap OKT adalah keterangan yang dibuat oleh OKT semasa perbicaraan kes *PP v. Remely* yang menyatakan wang RM10,000 adalah wang pinjaman dan ianya tidak selaras dengan pernyataan-pernyataan yang diakui oleh pegawai BPR yang

mengatakan wang tersebut ialah wang komisyen. Kesalahan ini juga timbul semasa OKT memberi keterangan di mahkamah pada 9hb. Julai 2003.

Ketiga-tiga pernyataan menunjukkan terdapat satu percanggahan iaitu percanggahan terhadap keterangan yang diberikan di mahkamah.

(page 15 and 16 of appeal record)

[11] Her reasoning, I found, was not totally focused and coherent although I agreed with her that there was really no duplicity of the kind meant by learned counsel. This was my take on the issue. P1 being the first statement kick-started the criminal process against Remely based on the accused's disclosure that an adjustment equivalent to 10% of the project price which he understood to be a commission was asked of him by Remely and it was duly given (see P1A in particular). According to SP3, he recorded P3 and P4 (P3 being of more relevance to the charge) as a follow-up on P1 to get additional information and to confirm that RM10,000 was indeed credited into the account of Remely (see p. 49 of appeal record).

[12] Meanwhile SP4 related that P5 was recorded to get the accused's explanation pertaining to letter P7 which was received from Remely wherein was stated that the said RM10,000 was given by the accused to Remely as a loan "untuk tujuan proses bagi menjalankan perniagaan isteri beliau". Before P5 was recorded, P1, P3 and P4 were read over to the accused by SP4. The accused stood by the truth of these statements. He also clarified that P7 was not prepared by him, he merely signed it out of sympathy for and to help Remely.

[13] It was hence clear that there was no "duplicity" or three permutation of inconsistent statements as alleged by learned counsel because in my view the three statements referred to in the charge are correlative and corresponded with the same matter namely "komisyen". The three statements not only complemented each other but further reinforced the fact in issue that it was a commission and nothing else that was asked for and given to Remely. What was the necessity then to charge the accused on three counts of inconsistency when the three statements taken together referred to an apparent corrupt payment that implicated Remely.

[14] The circumstances in the instant case are totally different from that of the case relied on by learned counsel, *Mahendran Manikam v. Public Prosecutor* [1997] 1 CLJ Supp 473. In that case, KC Vohrah J held that the prosecution's case related to two acts of unlawful sexual intercourse on two different dates and at two different places where clearly two different distinct offences and two separate charges ought to have been framed against the appellant. I would add that in the present case, the three statements were used to describe the inconsistency that formed the crux of the offence under s. 19(2) of the Anti-Corruption Act ie, loan ("pinjaman") which was a subsequent retraction from commission ("komisyen") used in the three statements, two words which are as different as day from night with both bearing different meanings. Commission read in the context of the three; statements on the whole meant a kickback whereas a loan is simply a sum of money lent.

[15] These two words, by definition, lead to the next issue.

Commission And Loan Defined As Gratification

[16] I must admit that learned counsel for the accused used a rather ingenious approach when he argued that there was no inconsistency as the two words "commission" and "loan" are bonded by a common denominator in the definition of "gratification" in s. 2 of the Anti-Corruption Act. Besides commission (para. (d) of the definition), a gratification also means a loan (para. (a) of the definition of "gratification"), thus it was contended that there was no inconsistency especially when the charge against Remely and the outcome of that case were not made known in the present case.

[17] The leaned deputy public prosecutor disagreed by countering that s. 19(2) pertains to a person making a subsequent statement which is inconsistent with a statement that he previously made to an officer of the Anti-Corruption Agency. The case against the accused was based on his testimony in court which was found to be inconsistent with the statements he made to SP1, SP3 and SP4.

[18] It was my view that the prosecution rightly relied on P2A in comparison with P1, P3 and P5 as well as on SP2's evidence to prove the charge under s. 19(2) against the accused. On this basis, I agreed with the learned deputy, En. Saiful Hazmi, that it was not important that the charge-sheet and report in *Remely*'s case were not tendered in the case against the accused. By way of analogy, he referred to *Yusof Omar lwn. PP* [2001] 3 CLJ 122 at p. 138.

[19] I would hasten to add that the decision of Yong Pung How CJ in *Public Prosecutor v. Heah Lian Khin* [2000] 3 SLR 609, a case cited by counsel for the accused, was a most helpful guide in comprehending the meaning of a previous inconsistent or contradictory statement. It was from this case that learned counsel took a leaf when he raised the earlier issue of "varying permutations of inconsistent statements". The Chief Justice held that:

> (1) .... In interpreting the phrase 'previous inconsistent or contradictory statement', a flexible as opposed to a rigid, semantic interpretation was preferred. In practice, there could be a wide variety of statements and an absolute oppositeness was not essential. The court had to compare the oral evidence with the previous statement and to assess the overall impression which had been created as a whole. The critical question was whether the two utterances, even if one was the utterance that "I can't remember', were in effect inconsistent and appeared to have been produced by incompatible beliefs.
>
> (2) Due to the varying permutations of inconsistent statements, it would be unduly restrictive and unrealistic to confine the operation of the statutory provisions to a situation where the witness gave two affirmative versions of the facts. A less semantic approach, which called for a comparison of the oral testimony with the previous statement as a whole to determine whether they were compatible, congruent or consonant in substance, spirit or form, was preferred.

[20] Yong Pung How CJ concluded that the phrase "previous inconsistent or contradictory statement" must necessarily encompass a witness who deliberately and falsely claimed that he was unable to recall the facts. This resulted from a flexible interpretation based on the compatibility approach.

[21] Our instant case, being more straightforward, however is one of "two affirmative versions" of a material fact or fact in issue. The word "komisyen" was obviously a material fact in the charge against Remely. When this word was omitted by the accused at the trial against Remely to be substituted with the word "pinjaman", it painted a distinctly different picture of events which occurred that led to the prosecution of Remely in the first case. The fact in issue to be proved became divergently different. An overall reading and understanding of the three statements (P1, P3 and P5) apart from the vital portions (P1A, P3A and P5C) further underscored the irreconcilable incompatibility between "komisyen" and "pinjaman" which irrefutably bear different meanings and connotations as stated earlier that had morphed the case against Remely.

[22] If the accused had stuck to asserting "komisyen" at the trial against Remely, the case would have carried on without any interruption. As it were, SP2 could not further continue with his examination of the accused when he found that his testimony and utterance of the word "pinjaman" was materially inconsistent with and contradicted what was staved in his statements made to the BPR officers.

[23] The evidence adduced by the prosecution was therefore sufficient to find a *prima facie* case against the accused although it appeared from the way the grounds of decision were written without ample reasons given for her findings made it seem that the Sessions Court Judge had not really thoroughly appraised the evidence before her. It could just be her style of writing but nevertheless this did not affect my opinion that any other conclusion at the end of the prosecution case would be against the weight of evidence adduced before the trial court.

Defence Case

[24] It was further submitted that the Sessions Court judge totally erred in her failure to comply with the legal requirement under s. 173(m)(i) of the Criminal Procedure Code when she came to this conclusion:

> Oleh kerana mahkamah berpendapat OKT telah gagal untuk menimbulkan keraguan dalam kes ini, mahkamah telah menyabitkan OKT atas pertuduhan ini.
>
> (page 16 of appeal record)

[25] Section 173(m)(i) of the Criminal Procedure Code provides:

> At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[26] I had analysed the defence testimony and it was my view that this was an unsustainable argument because on this analysis, I could only conclude that the defence had indeed failed to cast any reasonable doubt on the prosecution case resulting in the incontrovertible conclusion that the prosecution had proved its case beyond reasonable doubt.

[27] The accused was the only defence witness. In short, he explained that he was not allowed by the recording officers to tell the truth when they rejected his usage of the word "pinjaman". On this score, he decided to do so in court. From p. 73 of the appeal record, the accused is quoted as saying:

> Rujuk ekshibit P1 dan P1 (a), saya telah sebut banyak kali bahawa saya bagi pinjam tetapi Puan Maznah masih memujuk saya, tidak mahu menerima perkataaan pinjam, maka saya sebut adjust. Pemahaman saya adjust ialah pinjam.
>
> Saya beritahu pinjam tetapi catitan Puan Maznah sendiri adalah komisyen.

He said at p. 74:

> Rujuk ekshibit P3 dan P3(a): Saya ada memberi keterangan kepada Encik Khairolaffendi. Dia bertanya tentang duit RM10,000.00. Saya bagitahu itu adalah pinjaman dia tidak setuju dan masih mengikut keterangan yang diberi pada Puan Maznah.
>
> ... Saya ada bagitahu Khairolaffendi, kalau saya bercakap benar dan tidak boleh diterima, maka saya ambil keputusan untuk bercakap benar di dalam Mahkamah.

He further revealed:

> Puan Maznah beritahu sekiranya saya berpihak kepada BPR, maka saya dikecualikan terhadap semua tindakan Mahkamah. Sekiranya saya tidak berpihak kepada BPR, maka saya disalahkan dan boleh dipanjarakan selama 15 tahun.
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> (page 75 of appeal record)

With regard to P5, he explained in this manner:

> Saya tidak tenteram dengan soalan-soalan BPR, beberapa kali diberitahu perkataan pinjaman tetapi tidak mahu diterima dan untuk mengelakkan ditahan lebih lama, maka saya mengikut sahaja apa-apa cadangan Puan Hamidah.
>
> (page 75 of appeal record)

[28] It was clear that the accused imputed inducement or coercion by the BPR officers only at the defence stage. This line of defence was not put to SP1 and SP3 in cross-examination for them to agree or refute. The above was also tantamount to an afterthought and denial by the accused as correctly found by the trial judge. The

accused's account flew against the evidence in cross of SP1 who was emphatic that the accused did not state that "adjust" meant a loan and when asked about the word "adjust", the accused said that 10% of the contract price had to be paid to Remely. Likewise, SP3 affirmed in cross-examination that the accused did not say that he gave a loan of RM10,000 to Remely. The accused had the option to lodge a complaint or report that he was forced to use the word "komisyen" against his free will. He failed to do so by his own admission. It was in any event in his evidence that the said three statements were read over to him by the recording officers and he signed at the end of each to signify that they were true.

[29] Ultimately, he said these self-incriminatory words:

> Rujuk ekshibit P2. Ya, soalan-soalan diberikan oleh TPR Roshan merujuk pada Rangsangan Baru berkenaan kes hari ini. Jawapan-jawapan saya adalah berkenaan dengan projek Rangsangan Baru. Keterangan-keterangan adalah bermula dari saya dapat tawaran sehingga kerja selesai dan rujuk pada pernyataan-pernyataan dan merujuk pada wang komisyen.
>
> Ya, saya setuju bahawa pernyataan-pernyataan yang diberi pada BPR adalah bercanggah dengan apa yang diberikan di Mahkamah.
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> (page 82 of appeal record)

[30] At the end of the day, the tenor of his defence was inconsistent and not even plausible. The trial judge hence did not err when she found the accused guilty and convicted of the offence.

Sentence

[31] Any person found guilty and convicted of an offence under s. 19(2) shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

[32] I was of the view that the sentence meted out by the trial judge was not manifestly excessive. It was in fact appropriate by its deterrent effect to deter and discourage effectively witnesses from reneging on what they have earlier stated in the course of investigations by the relevant agency and in this case, the Anti-Corruption Agency then known as. Going back on their previous statements at the trial proper will debunk and derail in the blink of an eye the prosecution of the offence against an accused, hence

aborting the course of justice, whatever the eventual outcome. This will lead to futile prosecution that is curtailed by renegade witnesses and much public fund is wasted consequently. In such circumstances, public interest is adversely affected when the great effort and time in investigating and bringing offenders to book comes to nought.

[33] On this note, the appeal was dismissed with an affirmation of the conviction and sentence.